Supreme Court, U.S.
FILED
OCT 8 - 2009
OFFICE OF THE CLERK

142

(3)

No. 09-297

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MICHAEL W. DAVIS
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

CARTER G. PHILLIPS
C. FREDERICK BECKNER III
REBECCA K. WOOD*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

October 8, 2009

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE* DRI	1
INTRODUCTION	3
REASONS FOR GRANTING THE PETITION	5
I. THIS COURT'S REVIEW IS NEEDED TO CLARIFY THAT DUE PROCESS REQUIRES OBJECTIVE STANDARDS THAT PROVIDE FAIR NOTICE THAT PRIMARY CONDUCT MAY BE SUBJECT TO PUNITIVE DAMAGES	5
II. REVIEW IS NEEDED TO ADDRESS THE CIRCUMSTANCES IN WHICH COMPLIANCE WITH GOVERNMENT AND INDUSTRY STANDARDS LIMITS OR PRECLUDES THE IMPOSITION OF PUNITIVE DAMAGES	10
III. THE DECISION BELOW CONFLICTS WITH MANY WELL-REASONED DECISIONS HOLDING THAT COMPLIANCE WITH OBJECTIVE GOVERNMENT AND INDUSTRY STANDARDS IS RELEVANT TO OR PRECLUDES PUNITIVE DAMAGES	17
CONCLUSION	23

TABLE OF AUTHORITIES

CASES Page

Aldworth Co. v. *England*, 648 S.E.2d 198 (Ga. Ct. App. 2007) 21
Averitt v. *Southland Motor Inn of Okla.*, 720 F.2d 1178 (10th Cir. 1983) 21
BMW of N. Am., Inc. v. *Gore*, 517 U.S. 559 (1996) 6, 7, 9
Bankers Life & Cas. Co. v. *Crenshaw*, 486 U.S. 71 (1988) 9
Bouie v. *City of Columbia*, 378 U.S. 347 (1964) 5
Brand v. *Mazda Motor Corp.*, 978 F. Supp. 1382 (D. Kan. 1997) 19
Browning-Ferris Indus. of Vt., Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989) 2, 9
Center for Auto Safety v. *Peck*, 751 F.2d 1336 (D.C. Cir. 1985) 13
Conde v. *Velsicol Chem. Corp.*, 24 F.3d 809 (6th Cir. 1994) 11
Dorsey v. *Honda Motor Co.*, 655 F.2d 650 (5th Cir. Unit B Sept. 1981) 19
Exxon Shipping Co. v. *Baker*, 128 S. Ct. 2605 (2008) 8
First Nat'l Bank in Albuquerque v. *United States*, 552 F.2d 370 (10th Cir. 1977) 11
Gasperini v. *Center for Humanities, Inc.*, 518 U.S. 415 (1996) 1
Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000) 12, 15
General Motors Corp. v. *Iracheta*, 90 S.W.3d 725 (Tex. App. 2002), *rev'd on other grounds*, 161 S.W.3d 462 (Tex. 2005) 18
Giaccio v. *Pennsylvania*, 382 U.S. 399 (1966) 8

TABLE OF AUTHORITIES—continued

Page

Grimshaw v. *Ford Motor Co.*, 199 Cal. App. 3d 757 (1981) 19

International Union v. *Bagwell*, 512 U.S. 821 (1994) 5

Lane v. *Amsted Indus., Inc.*, 779 S.W.2d 754 (Mo. Ct. App. 1989) 19

McBoyle v. *United States*, 283 U.S. 25 (1931) 6, 16

Miles v. *Ford Motor Co.*, 922 S.W.2d 572 (Tex. App. 1996), *rev'd on other grounds*, 967 S.W.2d 377 (Tex. 1998) 18, 19

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) 11, 13

Philadelphia, Wilmington & Baltimore R.R. v. *Quigley*, 62 U.S. (21 How.) 202 (1858) 7

Phillip Morris USA v. *Williams*, 549 U.S. 346 (2007) 6, 8

Rhone-Poulenc, Inc v. *FDA*, 636 F.2d 750 (D.C. Cir. 1980) 11

Safeco Ins. Co. of Am. v. *Burr*, 551 U.S. 47 (2007) 8

Sloman v. *Tambrands, Inc.*, 841 F. Supp. 699 (D. Md. 1993) 18

State Farm Mut. Auto. Ins. Co. v. *Campbell*, 538 U.S. 408 (2003) 1, 6, 7, 19

Stolt-Nielsen S.A. v. *Animalfeeds Int'l Corp.*, No. 08-1198 (U.S.) 1

Stone Man, Inc. v. *Green*, 435 S.E.2d 205 (Ga. 1993) 17, 18

TXO Prod. Corp. v. *Alliance Res. Corp.*, 509 U.S. 443 (1993) 22

TABLE OF AUTHORITIES—continued

Page

Trotter v. *B&W Cartage Co.*, No. 05-cv-0205-MJR, 2006 WL 1004882 (S.D. Ill. Apr. 13, 2006) 21
United States v. *Bass*, 404 U.S. 336 (1971) .. 6, 16
United States v. *Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947) 20
United States v. *Harriss*, 347 U.S. 612 (1954) 6
United States v. *Lanier*, 520 U.S. 259 (1997) 9
United States v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820) 6, 16
Wise v. *Broadway*, 433 S.E.2d 857 (S.C. 1993) 21

STATUTE AND REGULATIONS

49 U.S.C. § 30101 13
49 C.F.R. § 571.216 14
36 Fed. Reg. 23299 (Dec. 8, 1971) 14
52 Fed. Reg. 49033 (Dec. 29, 1987) 13
61 Fed. Reg. 28550-01 (June 5, 1996) 14
Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49223 (Aug. 23, 2005) 14

SCHOLARLY AUTHORITIES

2 Am. Law Inst., *Enterprise Responsibility for Personal Injury—Reporters' Study* 95 (1991) 15
Richard C. Ausness et al., *Providing a Safe Harbor for Those Who Play by the Rules*, 2008 Utah L. Rev. 155 ..... 12, 15

TABLE OF AUTHORITIES—continued

Page

Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993) 12

John D. Graham, *Product Liability and Motor Vehicle Safety, in The Liability Maze* 120 (Peter Huber & Robert E. Litan eds., 1991) 14

Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 Colum. L. Rev. 277 (1985) 12

Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued By the Supreme Court of the United States in* Haslip, 42 Am. U. L. Rev. 1365 (1993) 15

W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285 (1998) 11

OTHER AUTHORITY

Restatement (Third) of Torts: Products Liability (1998) 12, 21

INTEREST OF *AMICUS CURIAE* DRI[1]

Amicus curiae DRI—the Voice of the Defense Bar, which is celebrating its 50th anniversary this year, is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of the defense attorney, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as *amicus* in cases that raise issues of importance to its membership and to the judicial system.

Recently, DRI has filed *amicus* briefs in cases involving the inconsistent application of law to issues of national importance. See, *e.g.*, *Stolt-Nielsen S.A.* v. *Animalfeeds Int'l Corp.*, No. 08-1198 (U.S.). DRI long has been a participant in cases involving due process issues, including fair notice, relevant to punitive damages. See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003), *Gasperini* v.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have received timely notice of *amicus curiae*'s intent to file this brief and have consented to the filing of this brief in letters on file with the Clerk's office.

Center for Humanities, Inc., 518 U.S. 415 (1996); *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

The decision below raises issues of special concern to DRI and its members. Although this Court has established a number of guideposts for determining when the *amount* of punitive damages impermissibly exceeds due process limits, there remains a need for additional clarity about when primary conduct is subject to any punitive damages at all. This need is particularly acute in the context of regulated conduct where an entity—having complied with detailed safety requirements established by a government entity charged with determining the appropriate level of public safety or industry standards reflecting a high degree of care—can hardly be expected to imagine that such primary conduct would later be exposed to punitive damages.

Additional guidance from this Court is needed to clarify the circumstances in which full compliance with federal, state, or industry standards is still not sufficient to avoid punishment by way of punitive damages, given the requirement that the defendant should be entitled to fair notice before such punishment can be meted out consistent with due process. In the absence of such guidance, awards of punitive damages remain marked by unacceptable unpredictability. Here, for example, although the California Court of Appeal points to no dispute that the defendant complied with detailed federal and industry standards regarding the very design points at issue in the litigation, the jury was instructed that compliance with such standards "does not exempt" the defendant from liability. Special Jury Instruction No. 5, *Buell-Wilson* v. *Ford Motor Co.*, No. GIC800836 (Cal. Sup. Ct. June 3, 2004). The jury

was further instructed that there is "no fixed standard" regarding punitive damages and given no objective benchmarks for determining whether such damages were warranted. Jury Instruction, No. 3949. Left without any meaningful guidance, the jury awarded $246 million in punitive damages (twice what the plaintiffs sought)—which the court later reduced to $55 million based on due process excessiveness principles. Pet. App. 4a, 6a. As to the fundamental question whether any punitive damages were warranted in light of such compliance, the defendant did not even receive a case-specific analysis from the court before going to the jury.

The lower and state courts' confusion over whether and when compliance with regulatory and industry standards is sufficient to preclude punitive damages calls out for this Court's review. As it stands, the utter randomness of when a regulated entity's conduct can be subject to punitive damages is not tolerable. This Court should grant certiorari and confirm that fundamental notions of due process dictate that punitive damages can be imposed only where a defendant has fair notice, based on objective standards, that particular conduct is subject to punishment.

INTRODUCTION

This case represents a disturbing trend for defendants: An enormous punitive damages award (originally well beyond what the plaintiff sought) is handed down by a jury with respect to injuries suffered from an accident involving a product built in conformance with substantial, directly applicable federal regulations and industry standards. In this context, objective standards do not exist under California state law that allow a regulated entity to

figure out what it must do to avoid being subject to punitive damages. As the law stands in California and other States, even for products that comply with applicable objective standards, the simple *post hoc* notion that a product could be made safer or better—as all products in some sense can be—appears sufficient by itself to support an award of punitive damages. Indeed, it appears California courts have concluded that compliance with federal, state, and industry standards is *irrelevant* to the imposition of punitive damages. This violates the fundamental due process requirement of fair notice. The court should grant certiorari to preclude States from imposing punitive damages on defendants in the absence of established, objective criteria putting the defendant on fair notice of what is required of it.

A fundamental aspect of due process is knowing what conduct potentially is subject to punishment. These notice principles apply with equal force to imposing punitive damages in the civil context. We do not doubt that in some circumstances compliance with government or industry standards will not be enough to immunize regulated entities from compensating injured parties. It is another matter entirely, however, to expose such parties to punishment. Where a defendant has complied with extensive government requirements or industry standards, it is hard to see how it can be said that the entity acted with the heightened intent, such as malice, typically required to impose punitive damages. In such a case, elemental notions of notice and the purpose of punitive damages—to deter future improper conduct and to punish prior bad conduct—is absent. Compliance with objective federal, state, and industry standards must be taken fully into account before any punishment is imposed.

Where a regulated entity complies with all applicable federal and industry regulatory standards regarding the matters at issue in the litigation, and these standards impose detailed and substantial safety requirements, there is no reasonable way to anticipate the kind of result and award in this case. This is underscored by the fact that eleven other juries found no compensatory damages, let alone punitive damages, were warranted in similar cases involving the same alleged defect. There is no way to conform primary conduct to these types of random jury awards. The purposes of punishment—deterrence and retribution—are rendered meaningless where a regulated entity would not reasonably know its conduct is open to punishment.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S REVIEW IS NEEDED TO CLARIFY THAT DUE PROCESS REQUIRES OBJECTIVE STANDARDS THAT PROVIDE FAIR NOTICE THAT PRIMARY CONDUCT MAY BE SUBJECT TO PUNITIVE DAMAGES.

The Due Process Clause of the Fourteenth Amendment protects defendants against arbitrary punishment by States. A fundamental aspect of due process is fair notice of what conduct is illegal and the consequences for not meeting that standard. See, *e.g.*, *International Union* v. *Bagwell*, 512 U.S. 821, 836-37 (1994) ("Due process traditionally requires that criminal laws provide prior notice both of the conduct to be prohibited and of the sanction to be imposed."); *Bouie* v. *City of Columbia*, 378 U.S. 347, 350-51 (1964) ("The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this

Court."); *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) ("To make the warning [that criminal liability is possible] fair, so far as possible the line should be clear."). Fair notice also undergirds the traditional rule of lenity. See generally *United States* v. *Bass*, 404 U.S. 336, 348 (1971) ("where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant"); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-97, 105-06 (1820) (Marshall, C.J.) (explaining the rule of lenity).

The "constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.*

These fair notice requirements apply with equal force to the context of civil punitive damages. See, *e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 n.22 (1996) ("[T]he basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil *penalties*.") (citation omitted). This follows because "these awards serve the same purposes as criminal penalties," namely to punish conduct the defendant was on notice was illegal and to deter future bad conduct. *Campbell*, 538 U.S. at 416 ("punitive damages serve a broader function [than compensatories]; they are aimed at deterrence and retribution"); *accord Phillip Morris USA* v. *Williams*, 549 U.S. 346, 352 (2007) ("'[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition'")

(alteration in original) (quoting *BMW*, 517 U.S. at 568).

For these reasons, punitive damages typically require a showing of highly culpable intent, such as malice, conscious disregard for safety, or other despicable conduct. See, *e.g.*, *Philadelphia, Wilmington & Baltimore R.R.* v. *Quigley*, 62 U.S. (21 How.) 202, 213-14 (1858) (observing that the malice required for punitive damages "implies that the act complained of was conceived in a spirit of mischief, or of criminal indifference to civil obligations").

The Court's precedents make clear that due process constrains not only the severity of punitive damages, but also whether *any* punitive damages may be imposed at all. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574; see also *Campbell*, 538 U.S. at 416 (due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor").

Particularly because civil defendants lack the full range of protections criminal defendants receive, the Court has expressed significant "concerns over the imprecise manner in which punitive damages systems are administered" and the "acute danger of arbitrary deprivation of property." *Campbell*, 538 U.S. at 417. This Court also has recognized that these concerns are magnified when jury instructions give wide discretion and provide few objective criteria for the jury to consider. *Id.* at 417-18. Accordingly it has long been

> established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

Giaccio v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966). For example, in considering punitive damages based on injuries to non-parties, the Court rejected the "near standardless dimension to the punitive damages equation" in which "[t]he jury will be left to speculate" thereby creating a circumstance in which "the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified." *Philip Morris*, 549 U.S. at 354; see also *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2640 (2008) (Breyer, J., concurring) (explaining the "need, grounded in the rule of law itself, to assure that punitive damages are awarded according to meaningful standards that will provide notice of how harshly certain acts will be punished and that will help to assure the uniform treatment of similarly situated persons").

Given these concerns, the Court's precedents make clear that due process requires an *objective* standard for imposing punishment. For example, in *Safeco Insurance Co. of America* v. *Burr*, 551 U.S. 47 (2007), in assessing whether a defendant recklessly disregarded the terms of the Fair Credit Reporting Act, the Court explained that although it disagreed with the defendant's erroneous reading of the pertinent statute, the defendant's interpretation was not "objectively unreasonable." *Id.* at 70 ("Given this dearth of guidance and the less-than-pellucid

statutory text, [defendant's] reading was not objectively unreasonable, and so falls well short of ... [evidencing] reckless liability."); cf. *United States* v. *Lanier*, 520 U.S. 259, 270 (1997) (explaining that the qualified immunity inquiry, like the fair notice one, is objective and "seeks to ensure that defendants reasonably can anticipate when their conduct may give rise to liability by attaching liability only if the contours of the right violated are sufficiently clear that a reasonable [defendant] would understand" that the conduct violates the pertinent legal standard) (internal quotation and alteration omitted). Thus, an objective standard is inherent in the very nature of "fair notice."

In response to these concerns, the Court has on several occasions established parameters for determining whether an award of punitive damages is unconstitutionally excessive. See, *e.g.*, *BMW*, 517 U.S. at 575. These guideposts include, "the degree of reprehensibility" of the conduct; the "disparity" between the compensatory and punitive aspects of the award; and the difference between the punitive damages award "and the civil penalties authorized or imposed in comparable cases." *Id.*

This case presents an opportunity for the Court to address an even more fundamental question—when a regulated entity has fair notice of objective standards regarding the type of conduct subject to punitive damages. See generally *Browning-Ferris*, 492 U.S. at 277 ("[W]e have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. That inquiry must await another day.") (citation omitted); *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concur-

ring in judgment) (observing that whether an entity had "advance notice of what conduct could render it liable for punitive damages" and "permitting juries to impose unlimited punitive damages on an ad hoc basis" has "touched on a due process issue that I think is worthy of the Court's attention in an appropriate case"). This case presents that question cleanly and the time for the Court to resolve it has come.

At a minimum, under existing due process standards, regulated entities should be entitled to a legal analysis by the court of whether their own conduct was objectively reasonable vis-à-vis objective guideposts such as pertinent government and industry standards. An objective standard for determining the illicit intent or conduct needed to support an award of punitive damages is critical to ensure that regulated entities can order their conduct *ex ante* to avoid punishment.

II. REVIEW IS NEEDED TO ADDRESS THE CIRCUMSTANCES IN WHICH COMPLIANCE WITH GOVERNMENT AND INDUSTRY STANDARDS LIMITS OR PRECLUDES THE IMPOSITION OF PUNITIVE DAMAGES.

Potential defendants across a variety of industries organize their conduct—and thus receive notice of what acts may lead to the imposition of liability—by reference to a web of federal, state, and local regulations, as well as to detailed and rigorous industry standards. Like petitioner here, many manufacturers have regular interaction with the bodies that regulate them, and go to great lengths to conform their conduct to the requirements established by those regulators.

Regulators' core responsibilities often include conducting risk-benefit analyses. See, *e.g.*, *Conde* v. *Velsicol Chem. Corp.*, 24 F.3d 809, 811 (6th Cir. 1994) (discussing EPA's risk-benefit analyses); *Rhone-Poulenc, Inc* v. *FDA*, 636 F.2d 750, 754 (D.C. Cir. 1980) (per curiam) (same, FDA); *First Nat'l Bank in Albuquerque* v. *United States*, 552 F.2d 370, 376-77 (10th Cir. 1977) (same, Department of Agriculture); see also *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983) (requiring that agency's rule-making give consideration to "effective and cost-beneficial" technology). Whether by setting standards, determining whether a product or activity meets those standards, or by directly analyzing the product or activity across a range of criteria, regulators often make threshold determinations that potential negative social consequences do not outweigh potential gains.

As part of this inquiry, regulatory bodies necessarily recognize that there is "no free lunch" in striking this balance. That is, in many cases, it may not be possible to increase the notion of "safety" in one respect without reducing it in another respect or imposing other significant costs. A change that reduces potential injuries of one kind may actually increase the risk of another type of injury. Put another way, subject only to the limits of what technology and the laws of nature will permit, many products can be made "safer" in the abstract. But that gain often can be made only at the cost of making it less effective, unusable for its intended use, or potentially too expensive to be of any real value to most consumers. See, *e.g.*, W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 307 (1998) (discussing "the exorbitant costs of

reducing risks to a zero level"); Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 13-14 (1993) ("It seems unlikely that the public would pay 24 to 60 times more per car to save far fewer lives."); Restatement (Third) of Torts: Products Liability § 2, cmt. a (1998) ("Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky.").

In the automobile industry and a host of other fields, legislatures, regulators, and other technical bodies are best positioned—possessing the expertise and global perspective—to assess what tradeoffs are efficient and necessary. See generally *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 876-80 (2000) (discussing the range of considerations the Department of Transportation and the National Highway Traffic Safety Administration (NHTSA) assess before striking a regulatory balance in establishing federal standards). As many commentators have explained, "legislative bodies and regulatory agencies are better equipped than courts to formulate effective safety standards." Richard C. Ausness et al., *Providing a Safe Harbor for Those Who Play by the Rules*, 2008 Utah L. Rev. 115, 132-33; *id.* at 133 n.160 (discussing this principle in the context of automobile safety); see, *e.g.*, Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 Colum. L. Rev. 277, 333-35 (1985).

Unlike a jury, which sees accidents and other negative effects of a product or activity only in hindsight without sufficient perspective about the typical benefits, regulators must set standards that prospectively account for social costs and benefits

overall. Cf. Oral Argument, *Warner Lambert Co.* v. *Kent*, No. 06-1498, 2008 WL 495030, at *30 (U.S. Feb. 25, 2008) ("Now, who would you rather have make the decision as to whether this drug is, on balance, going to save people or, on balance, going to hurt people? An expert agency, on the one hand, or 12 people pulled randomly for a jury rol[l] who see before them only the people whom the drug hurt and don't see those who need the drug to cure them?").

The federal safety standards at issue in this case, for instance, involve highly complex issues and are administered by the NHTSA, which is empowered to "prescribe motor vehicle standards" and "carry out needed safety research and development." 49 U.S.C. § 30101. NHTSA has formidable technical expertise that permits it to fulfill these functions. See, *e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 53 (noting "agency's discretion to pass upon the generalizability of ... field studies .... is precisely the type of issue which rests within the expertise of NHTSA, and upon which a reviewing court must be most hesitant to intrude"); *Center for Auto Safety* v. *Peck*, 751 F.2d 1336, 1360 (D.C. Cir. 1985) (Scalia, J.) ("[E]ngineering judgment is assuredly the sort of expertise that NHTSA preeminently possesses.").

Here, the NHTSA had directly applied its considerable technical expertise to the stability and roof safety issues implicated by the plaintiffs' claims and the punitive damages verdict. For instance, NHTSA studied stability safety issues for decades and adopted standards that provided for consumer safety without "reduc[ing] the capability of utility vehicles." 52 Fed. Reg. 49033, 49036-37 (Dec. 29, 1987). The agency also explained in detail that imposition of certain rollover standards would

require other safety sacrifices that it was unwilling to make:

> [V]ehicle rollover stability is not the same as vehicle handling and control. Some measures that improve [rollover] do not necessarily result in improved directional control and stability.... [D]irectional control and stability would be adversely affected as a result of relying upon suspension changes to make small increases in the vehicle safety metrics.

61 Fed. Reg. 28550, 28552-53 (June 5, 1996).[2] Similarly, the agency specifically studied roof safety and promulgated standards governing the issue. See 49 C.F.R. § 571.216 (commonly known as FMVSS 216); see 36 Fed. Reg. 23299, 23299 (Dec. 8, 1971) (discussing findings based on available data, and stating "[t]he roof crush standard will provide protection in rollover accidents"); see also Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49223 (Aug. 23, 2005).

In this light and in similar circumstances, the objective standards imposed by agencies—which rest upon their superior technical expertise and their determinations that meeting the standards will have desirable consequences—should be deemed highly relevant, if not dispositive, for due process purposes. A regulated entity's effort to comply with meaningful government standards on safety or efficacy is telling. Evidence of such efforts should be relevant to, if not outright preclude, the conclusion that the defendant

---

[2] Safety rarely, if ever, is a zero-sum game. *See, e.g.*, John D. Graham, *Product Liability and Motor Vehicle Safety, in The Liability Maze* 120, 126 (Peter Huber & Robert E. Litan eds., 1991) (noting that some safety features may increase exposure to liability claims related to those features).

had notice that the very conduct found by the regulator to be appropriate nonetheless may give rise to the imposition of punishment in the form of punitive damages. As here, where "malice" is required for the imposition of punitive damages, a company's dutiful compliance with the law is simply not reconcilable with the *mens rea* required for the punishment. See, *e.g.*, Ausness, *supra*, at 155 ("[E]ven if safety standards are not optimal, good faith compliance with them would still be inconsistent with the type of intent that is necessary to impose punitive damages."); 2 Am. Law Inst., *Enterprise Responsibility for Personal Injury—Reporters' Study* 95, 101 (1991) ("If a defendant has fully complied with a regulatory requirement ... it is hard to justify the jury's freedom to award punitive damages."), *quoted in* Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued By the Supreme Court of the United States in* Haslip, 42 Am. U. L. Rev. 1365, 1383 (1993); cf. *Geier*, 529 U.S. at 893 (Stevens, J., dissenting) (noting that compliance with federal regulations "would presumably weigh against an award of punitive damages").

At times, of course, the balance struck by a company and approved by the applicable regulatory body is not perfect. An error may cause a harm that would have been avoidable through a socially beneficial additional expenditure on safety. It is one thing for a State to assess liability for negligence or strict liability in the face of such errors.[3] But it is

---

[3] Of course, depending on the nature of the congressional scheme, the specific regulatory action, and the claim at issue, such conduct also may be subject to a preemption analysis. Preemption is not, however, being invoked by petitioner here. *See* Pet. 18 n.2.

altogether another matter to impute "malice" to what was, at most, a defendant's reasonable error in judgment that the expert regulatory body also made.

Unless compliance with regulatory standards or state-of-the-art industry guidelines are appropriately considered in the due process inquiry, there is significant danger that juries will continue to conflate mere awareness of potential risks with malice—unconstitutionally imposing punishment without meaningful notice as a result. In some sense, in every case, a regulated entity might be said to be aware that its product or activity creates a certain degree of risk, which is why compensatory awards may remain legitimate in some cases. Yet, in assessing whether constitutionally sufficient notice exists for a punitive award, there must be a clear line demarcating that mere knowledge of potential, sometimes inevitable, risk from the knowledge and conduct that reaches the level of malice. Otherwise, as under the rule of the court below, there is the absurd result that every potential defendant is viewed effectively to have sufficient notice that it may be liable for punitive damages simply for understanding a universal truth, *viz.* more safety is always theoretically possible. Under this improper view, compliance with objective federal, state and industry standards is irrelevant to the imposition of punitive damages. That, however, is no way to impute notice and impose a punishment akin to a criminal sanction. Such a misguided rule stands in great tension with principles of notice that have remained constant in this Court's criminal jurisprudence. See *McBoyle*, 283 U.S. at 27 ("To make the warning [that criminal liability is possible] fair, so far as possible the line should be clear."); *accord Bass*, 404 U.S. at 348; see also *Wiltberger*, 18 U.S. (5 Wheat.) at 95-97, 105-06.

III. THE DECISION BELOW CONFLICTS WITH MANY WELL-REASONED DECISIONS HOLDING THAT COMPLIANCE WITH OBJECTIVE GOVERNMENT AND INDUSTRY STANDARDS IS RELEVANT TO OR PRECLUDES PUNITIVE DAMAGES.

There is a deep and growing division about whether compliance with government or industry standards negates the culpable conduct often essential to awarding punitive damages.

Many courts have recognized that compliance with objective standards—be they imposed by a government or industry body—precludes or otherwise limits the imposition of punitive damages because such conduct is irreconcilable with the highly culpable mental state typically necessary to award punitive damages. An entity that has endeavored to comply with specific and meaningful standards enacted by a government regulator (or recognized industry standard setters) charged with ensuring safety and other societal goods, or industry standards evidencing a high degree of care, cannot be said to have acted with the malice typically needed to award punitive damages.

For example, in reversing a punitive damages award, the Georgia Supreme Court held that "compliance with county, state, and federal regulations is not the type of behavior which supports an award of punitive damages; indeed, punitive damages, the purpose of which is to 'punish, penalize or deter' are, as a general rule, improper where a defendant has adhered to environmental and safety regulations." *Stone Man, Inc.* v. *Green*, 435 S.E. 2d 205, 206 (Ga. 1993). This follows because such compliance "tend[s] to show that there is no clear and convincing evidence of 'willful misconduct, malice,

fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences.'" *Id.* (quoting *General Refactories, Co.* v. *Rogers*, 239 S.E.2d 795, 798 (Ga. 1977)). Similarly, the District of Maryland recognized that where a "defendant successfully proved that it complied with federal regulations, the Court concludes that [defendant] did not act with malice ... and thus plaintiff is not entitled to punitive damages." *Sloman* v. *Tambrands, Inc.*, 841 F. Supp. 699, 704 n.8 (D. Md. 1993).

In the same vein—in a case that presents particular problems for the rule of law because it involved Ford, the petitioner here, and comes to a different result than this case—the Texas Court of Appeals concluded that when a defendant "relies in good faith ... on conclusions by the governmental agencies charged with administering safety regulations in the area of its product that the product is not unreasonably dangerous, it cannot be said ... to have acted with conscious indifference to an extreme risk." *Miles* v. *Ford Motor Co.*, 922 S.W.2d 572, 589-90 (Tex. App. 1996) (reversing jury's finding of malice as unsupported by the evidence and remanding for a new trial), *rev'd on other grounds*, 967 S.W.2d 377 (Tex. 1998); see *General Motors Corp.* v. *Iracheta*, 90 S.W.3d 725, 741 (Tex. App. 2002) ("In *Miles*, the court of appeals recognized that most commentators suggest that compliance with a safety standard should bar liability for punitive damages."), *rev'd on other grounds*, 161 S.W.3d 462 (Tex. 2005). This follows because even when a defendant's decision about a product, in retrospect, "may have turned out to be a mistake (ordinary negligence), it certainly cannot be said to have been a decision ... in spite of a

known extreme risk of harm." *Miles*, 922 S.W.2d at 590 (emphasis added).

Similarly, the Missouri Court of Appeals has explained that "[c]ompliance with industry standard and custom impinges to prove that the defendant acted with a nonculpable state of mind ... and hence to negate any inference of complete indifference ... for the safety of others the proof of punitive damages entails." *Lane* v. *Amsted Indus., Inc.*, 779 S.W.2d 754, 759 (Mo. Ct. App. 1989).

The court below and other courts, unfortunately, follow a different path. See, *e.g.*, *Dorsey* v. *Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. Unit B Sept. 1981); *Brand* v. *Mazda Motor Corp.*, 978 F. Supp. 1382, 1387-88, 1391-93 (D. Kan. 1997). The decision below provides a particularly stark example. Based on a nearly three decades' old decision, *Grimshaw* v. *Ford Motor Co.*, 199 Cal. App. 3d 757, 811 (1981), the court below concluded that federal safety standards are *irrelevant* to the notice aspect of the due process inquiry and do not even entitle defendants to a case-specific analysis. See Pet. App. 61a-62a. But *Grimshaw* did not involve a defense of compliance with existing regulatory standards, but dealt with industry standards alone. See 199 Cal. App. 3d at 803; *accord* Pet. App. 27a-28a. Neither *Grimshaw* nor any case on which it relied cited the United States Constitution or appeared to consider an as-applied federal due process challenge. See *Grimshaw*, 199 Cal. App. 3d at 811 (collecting cases). In all events, the approach of the court below was improper because it ignored substantial developments in this Court's jurisprudence concerning the due process implications of awarding punitive damages, see, *e.g.*, *Campbell*, 538 U.S. at 416-17, as

well as regulatory activity that has occurred since that time.

Any purported "analysis" by the court below, and there was none in any meaningful sense, is no more than *ipse dixit*. See Pet. App. 61a-62a; see also *id.* at 27a-28a. The court failed to analyze within the context of this Court's due process precedents how a defendant's compliance with industry standards shapes what notice it has about the nature and extent of its liability. Moreover, the court below did not even attempt to grapple with notice in light of existing regulation. It should go without saying that the emerging efforts to regulate automobile safety at the time of the accident in *Grimshaw* bear little resemblance to the well-defined regulatory state of today. As described above, the DOT and NHTSA have a primary role in assessing the sufficiency of automobile safety measures, including those directly implicated by petitioner's claims. See § II, *supra*. This and other courts have acknowledged the expertise of those regulators and deferred to their policy judgments as rational, see *id.*, which should carry some weight in the notice inquiry.

The court below instead opined that compliance with prevailing objective standards was not controlling—not only for purposes of negligence and strict liability, but also for determining malice itself—because Ford supposedly knew it could make the Explorer safer, but declined to do so because of economic considerations. But this is nothing more than a tautology. As discussed above, any product can be made safer in some sense at a cost. See § II, *supra*; see also *United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.). Moreover, except by reference to the existing regulatory and industry standards, a party has little

basis to know how much additional safety is required *ex ante*. Cf. Restatement (Third) of Torts: Products Liability § 2, cmt. a. If the mere existence of knowledge that a product could be made safer is by itself sufficient to give notice that punitive damages may be imposed, then potential defendants are always exposed arbitrarily to punitive damages, no matter how carefully they act. In addition, the Court of Appeal further erred in holding that it would be reversible error even to consider comparable rollover statistics and in positing that industry standards are irrelevant to the analysis.

Such an approach also stands to create significant asymmetry in the assessment of punitive damages. In many jurisdictions, *violations* of government standards already serve as a predicate for the imposition of punitive damages. See, *e.g.*, *Averitt* v. *Southland Motor Inn of Okla.*, 720 F.2d 1178, 1182-83 (10th Cir. 1983) (punitive damages justified where defendant violated health department regulations); *Aldworth Co.* v. *England*, 648 S.E.2d 198, 201 (Ga. Ct. App. 2007) (defendant's violation of federal trucking regulation supported punitive damages); *Wise* v. *Broadway*, 433 S.E.2d 857, 859 (S.C. 1993) (punitive damages may be submitted to the jury where evidence of a statutory violation exists); *Trotter* v. *B&W Cartage Co.*, No. 05-cv-0205-MJR, 2006 WL 1004882, at *8-9 & n.1 (S.D. Ill. Apr. 13, 2006) (collecting cases where punitive damages issues were submitted to juries based on violation of regulatory standards). Against this backdrop, it stands to reason that *compliance* with such standards should provide potential defendants with reasonable assurance that their conduct would not trigger the imposition of punitive damages. At a minimum, compliance with such standards must be considered

to be relevant to whether punitive damages can be imposed. Yet, under the decision of the court below, a defendant would have no more and no less notice that it might be found liable for punitive damages irrespective of the objective lawfulness of its actions.

* * * *

This Court's immediate review is important for resolving the confusion below. In recent years, this Court has done much to bring clarity to punitive damages law, particularly with respect to how severe a punitive damage award may be imposed if a jury finds such damages appropriate. As the petition and the foregoing discussion make plain, however, defendants continue to face great unpredictability as to *when* they may be liable in the first instance for punitive damages. This continued uncertainty is unacceptable. As Justice O'Connor recognized more than a decade ago, "[a]s little as 30 years ago, punitive damages awards were 'rarely assessed,'" but their frequency has "skyrocket[ed]." *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 500-01 (1993) (O'Connor, J., dissenting). Despite the proliferation, as here, "many courts continue to provide jurors with skeletal guidance" about when punitive damages are appropriate. *Id.* Thus, defendants may be left without fair notice that their conduct—even when compliant with federal or other regulatory standards—can expose them to punishment. Only this Court's review can properly cabin punitive damages in line with the fundamental protections of due process.

CONCLUSION

For these reasons, and those stated by petitioner, this Court should grant the petition for certiorari.

Respectfully submitted,

MICHAEL W. DAVIS
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

CARTER G. PHILLIPS
C. FREDERICK BECKNER III
REBECCA K. WOOD*
EAMON P. JOYCE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

October 8, 2009

* Counsel of Record